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No. 640

In the Supreme Court of the United States

OCTOBER TERM, 1935

J. EDWARD JONES, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The opinion of the District Court (R. 103–110) is reported in 12 F. Supp. 210, and the opinion of the Circuit Court of Appeals (R. 119–125) is reported in 79 F. (2d) 617.

JURISDICTION

The decree to be reviewed was entered November 12, 1935 (R. 125–126). A petition for rehearing was filed November 18, 1935, and denied on November 21, 1935 (R. 126–127). Petition for certi-

orari was filed December 17, 1935, and was granted February 3, 1936. The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Securities Act of 1933 authorized respondent, the Securities and Exchange Commission, to seek, and the District Court to issue, an order requiring petitioner to appear and testify concerning a registration statement which he had theretofore filed pursuant to the Act.

2. Whether the provisions of the Securities Act which required the petitioner to appear and testify are a valid exercise of the powers granted to Congress by the Constitution.

STATUTES AND REGULATIONS INVOLVED

The Securities Act of 1933 (Act of May 27, 1933, c. 38, 48 Stat. 74, U. S. C., Title 15, Section 77a *et seq.*), as amended by the Act of June 6, 1934 (c. 404, 48 Stat. 881, 905), and the pertinent regulation of the Securities and Exchange Commission, are reprinted in the Appendix.[1]

STATEMENT[2]

On May 4, 1935, J. Edward Jones, the petitioner, filed a registration statement with the Securities

[1] The act reprinted in petitioner's brief as Appendix B is the Securities Act as originally enacted, without the amendments of 1934.

[2] A complete chronology of the present case has been added to the Appendix to the present brief, pp. 123–126, *infra*.

and Exchange Commission on the Commission's Form C–1, pursuant to Section 6 of the Securities Act, *infra,* p. 74. The registration statement, which is reprinted in full in the record (R. 33–88), covered an issue of "Participation Trust Certificates in producing oil royalties", known as "J. Edward Jones Royalty Trust, Series 'M.' "

It appeared to the Commission that this registration statement included untrue statements of material facts required to be stated therein, and omitted to state material facts necessary to make the statements therein not misleading (R. 3–4).[3] On May 20, 1935, the Commission, therefore, pursuant to the provisions of Section 8 (d) of the Act, *infra,* p. 78, directed that stop order proceedings be instituted before a designated officer of the Commission, to determine whether a stop order should be issued (R. 12). Notice was sent to petitioner by telegram on May 23, and confirmed by letter on May 24, that a hearing would be held on June 6, at which time petitioner might appear and show cause why the Commission should not issue a stop order suspending the effectiveness of the registration statement (R. 12–13; 89–90). By agreement

[3] The relevant facts are not in dispute. However, certain of the minutes, orders, etc., to which reference is made in the present case are not set out in full in the present record. They may be found in the record in *J. Edward Jones* v. *Securities and Exchange Commission*, No. 639, Oct. Term, 1935, in which petition for a writ of certiorari was denied. The Commission minute of May 20, 1935, authorizing the stop order proceeding, is set out in that record at p. 109, and is also reprinted in petitioner's brief at p. 68.

of counsel, the hearing was postponed to June 18, 1935. On May 24, twenty days after the date of filing, petitioner's registration statement became effective, pursuant to Section 8 (a) of the Act, *infra,* p. 77.

On June 18, the hearing and examination were duly held (R. 14). At the hearing counsel for petitioner attempted to withdraw the registration statement (R. 25). Permission to withdraw was refused by an appropriate ruling of the Commission (R. 25; see also R. No. 639, p. 180). The hearing was then adjourned to June 27 (R. 14).

On June 18 the officer conducting the hearing, pursuant to power granted him by an order of the Commission (R. 14), issued a subpoena directing petitioner to appear before said officer on June 27 to testify regarding his registration statement. (R. 15–16; 96.) This subpoena was duly served on petitioner by a United States Marshal in New York City on June 20, 1935, and service was admitted (R. 22). On June 27, petitioner failed to appear at the adjourned hearing but, through his counsel, appeared specially and stated that petitioner refused to obey the subpoena.

At the same hearing, counsel for petitioner presented successively a dismissal of the registration statement (R. 96–97), a motion to dismiss the registration statement (R. 97–98), a motion to quash the subpoena which had been served on petitioner (R. 98–99), and an objection to jurisdiction (R. 100–101). All the motions were denied (R. 26–27).

In making the several rulings on June 27, and in refusing petitioner permission to withdraw his registration statement on June 18, the Commission and the officer conducting the hearing acted under authority of a regulation of the Commission which was published in Release No. 47 on September 22, 1933, *infra*, p. 110. The pertinent part of the regulation provided (R. 92–93):

> Any registration statement or any amendment thereto may be withdrawn upon the request of the registrant if the Commission consents thereto. * * * The papers comprising the registration statement or amendment thereto shall not be removed from the files of the Commission but shall be plainly marked with date of the giving of such consent * * *. Such consent shall be given by the Commission with due regard to the public interest and the protection of investors.

On July 2 the Commission filed an application in the District Court of the United States for the Southern District of New York (R. 2–16), pursuant to Section 22 (b) of the Act, *infra*, p. 96. This application sought an order of the District Court directing petitioner to appear before the Commission, or one of its examiners, "to testify in the matter of the registration statement of J. Edward Jones and to give answer to any and all pertinent questions regarding the information and documents heretofore filed by the respondent [Jones]

with the Commission upon the said registration statement" (R. 15). An order to show cause issued (R. 16) and petitioner appeared and filed an answer (R. 17–29).

After argument, the District Court, on August 12, 1935, rendered an opinion (R. 103–110) holding that the Commission was authorized, under the Act and the regulation published in Release No. 47, to deny petitioner's motions to dismiss his registration statement, and to continue the proceedings in which petitioner had been subpoenaed to testify; and further holding that the provisions of the Securities Act were a valid exercise of the powers of Congress over "commerce with foreign nations and among the several states" and over "post offices and post roads." Accordingly, on August 23, 1935, the District Court issued an order granting the prayer of the Commission's application. (R. 102–103.) The order was affirmed by the Circuit Court of Appeals (R. 126). That court rested the validity of the Securities Act solely on the power of Congress "to establish post offices and post roads" (R. 119–125), and found it unnecessary to discuss the question whether the registration provisions of the Act could also be sustained under the commerce clause.

SUMMARY OF ARGUMENT

I

The Commission submits that the registration statement filed by the petitioner became effective

by operation of law despite petitioner's attempts to withdraw it. The Commission properly refused to permit withdrawal pursuant to a valid regulation which is authorized both by Section 19 (a) of the Act and by the inherent power of the Commission, as a quasi-judicial tribunal, to limit the right of petitioner to terminate the proceedings before the Commission. This regulation is reasonable, since it is conditioned on a standard of public interest and the protection of investors, and it is necessary because an unqualified privilege of withdrawal would seriously embarrass the work of the Commission and deprive it of the most effective means of enforcing the registration provisions of the Act.

The publication of this regulation satisfied the requirements of Section 19 (a) of the Act and was clearly adequate to give reasonable notice of its promulgation. Petitioner does not claim he was ignorant of the regulation. The Act does not improperly delegate legislative power to the Commission, for the power to regulate the minutiae of its own procedure may certainly be delegated to a quasi-judicial tribunal.

The regulation was properly applied in the instant case, for the Commission was not required to find that its refusal to permit withdrawal of the statement was in the public interest and for the protection of investors. Such a finding is a preliminary determination of fact resting in the discretion of the Commission; no principle of law

requires a finding by a court or an administrative tribunal prior to the application of an interlocutory procedural regulation.

It follows that petitioner's registration statement is still effective, and the stop order hearing thereon, in which the petitioner was subpoenaed to testify, is still pending before the Commission. Sections 8 (d) and 8 (e) of the Act expressly authorize subpoenas *duces tecum* in such a hearing, so that the less onerous subpoenas *ad testificandum* must also be authorized. This follows, too, from the finality attributed to the findings of the Commission on review by a Circuit Court of Appeals (Section 9). Even though the Commission may issue a stop order if the issuer refuses to testify, this is not the only remedy available, for such a construction would work an injustice in some cases. In any event, Section 8 is implemented by Section 19 (b), expressly authorizing subpoenas in all investigations necessary for the enforcement of the Act.

Petitioner's claim that the Commission is engaged on a "fishing expedition" is rebutted by the notice of the stop-order hearing, specifying in detail the items in the registration statement on which information is desired, and by the order of the District Court, requiring petitioner to testify only as to pertinent matters.

II

For purposes of determining the validity of the present order the only section which is material is Section 5 (a). Since petitioner did not wait for specific questions to be put to him but flatly refused to appear before the Commission, he must demonstrate that there is no question which the Commission validly might ask concerning his registration statement. Similarly, to sustain the validity of the present order the Commission need only show that there is some purpose for which the Commission can validly require that petitioner appear before the Commission for questioning upon matters contained in his registration statement.

A

The postal power of Congress is a plenary one and under it Congress has wide discretion as to the matter which shall be carried and that which shall be excluded from the mails. This power is not limited to excluding only that matter which might be injurious to the postal service or the personnel, for in numerous cases this Court has sustained statutes excluding from the mails matter deemed injurious to the public, such as lottery tickets, obscene matter, and communications in furtherance of a scheme to defraud. The requirements of Section 5 in issue in the present case are another instance of the exercise of the established power of Congress to close

the mails to matter which it deemed contrary to the public welfare, and are thus amply sustained by these cases.

Congress may exclude securities which themselves contain misstatements. Congress may also exclude such securities if they are an integral part of a scheme to defraud. Further, Congress may require registration of all securities since this is reasonably necessary to make effective the exercise of its regulatory power. Finally, that the act will not bar from the mails all harmful securities is no objection to its validity; Congress may certainly limit the exercise of its power to the particular type of evil here involved, namely, the failure to disclose the true character of securities.

Petitioner contends that Section 5 (a) of the Act conflicts with the Tenth Amendment. This Court has, however, several times pointed out that Congress need not have power to deal with crime or immorality within the States in order to forbid the use of the mails in furthering such activities. Nor does the Act, as petitioner contends, apply to persons rather than to objects mailed, although even if it be so construed, its constitutionality is clearly sustained by previous decisions of this Court. Petitioner's final contention that a requirement of registration violates the due process clause of the Fifth Amendment is unsound, for such a requirement in state securities acts has frequently been

sustained by this Court, and a substantially similar requirement was upheld in connection with the power of Congress to classify mailable matter.

B

In support of its contention that the registration provisions of the Securities Act are a valid exercise of the commerce power of Congress, respondent submits that (1) securities are subjects of commerce, and (2) a prohibition against the interstate transportation of unregistered securities is within the regulatory power of Congress.

Securities are "subjects of commerce" not only because they are so treated by ordinary business usage and state legislation, but also because they comply with the applicable legal standards formulated in the *Lottery Case,* 188 U. S. 321, and the insurance cases. If they are transported across state lines without being truthfully described they may injure persons in the state of destination. The prevention of the spread of evil across state lines and the prohibition against the use of the facilities of interstate commerce as an agency to promote dishonesty are shown by prior decisions to be within the scope of Congressional regulatory power. Since in the Securities Act the regulatory power has been used merely to require a disclosure of the character of subjects carried and not to affect their local production the Act does not fall within the prohibition of the Tenth Amendment

nor of *Hammer* v. *Dagenhart,* 247 U. S. 251. The particular form of securities regulation involved in registration has already been held to afford due process in the substantially similar field of State Blue Sky legislation.

ARGUMENT

I

THE SECURITIES ACT OF 1933 AUTHORIZED THE COMMISSION TO SEEK, AND THE DISTRICT COURT TO ISSUE, THE ORDER REQUIRING PETITIONER TO APPEAR AND TESTIFY CONCERNING HIS REGISTRATION STATEMENT

Petitioner urges (Br., pp. 57–71) that the Securities Act, properly interpreted, does not authorize the issuance of the present order requiring him to appear and testify before the Commission. The argument is made that no proceeding is pending before the Commission in which a subpoena could issue, since petitioner's attempts to withdraw his registration statement terminated its effectiveness. In support of this, petitioner argues that his attempts to withdraw it were denied pursuant to a regulation which is not only invalid, but also improperly applied to him. Petitioner also argues that even though permission to withdraw his statement was properly denied, nevertheless the Act gives the Commission no power to compel him to appear and testify in the hearing which it was conducting. Respondent submits that neither argument is sound.

The first issue raised by the petitioner, then, is whether his registration statement is still effective.[4] which, in turn, depends upon whether the Commission has authority to impose restrictions on petitioner's right to withdraw it. The restrictions which the Commission imposes have been set forth in the regulation of September 22, 1933, published in Release No. 47 of the Federal Trade Commission, *infra*, p. 110, and continued in effect as a regulation of the Securities and Exchange Commission.[5]

---

[4] Petitioner is manifestly in error in his contention (Br. p. 2) that his registration statement never became effective at all because of the telegraphic notice of the stop order hearing dated May 23, 1935 (R. 12–13). This notice merely stated that it appeared to the Commission that his registration statement contained untrue statements and omissions of material facts and also stated that petitioner might appear and show cause on June 6, 1935, why a stop order should not issue suspending the effectiveness of his registration statement. Once a statement has been filed it becomes effective in 20 days pursuant to Section 8 (a), except for two contingencies: (1) an amendment may be filed pursuant to Section 8 (a); (2) a notice may be given within ten days after filing pursuant to Section 8 (b) that the registration statement is incomplete or inaccurate, followed by an order of the Commission postponing the effective date. Neither of these was done. Petitioner's registration statement, therefore, having been filed on May 4, 1935, became effective on May 24, 1935, by force of Section 8 (a).

[5] Section 210 of the Securities Exchange Act of 1934 (c. 404, 48 Stat. 908, U. S. C., Title 15, Sec. 78ii) provided: "* * * All orders, rules, and regulations which have been issued by the Federal Trade Commission under the Securities Act of 1933 and which are in effect shall continue in effect until modified, superseded, revoked, or repealed."

The pertinent provision of this regulation provided:

> Any registration statement or any amendment thereto may be withdrawn upon the request of the registrant if the Commission consents thereto. The fee paid upon the filing of such registration statement shall not be returned to the registrant. The papers comprising the registration statement or amendment thereto shall not be removed from the files of the Commission but shall be plainly marked with date of the giving of such consent and in the following manner: "Withdrawn upon the request of the Registrant, the Commission consenting thereto." Such consent shall be given by the Commission with due regard to the public interest and the protection of investors.

Respondent submits that the Act clearly invests it with power to promulgate such a regulation, and that even without such statutory authority the regulation would be justified under the inherent powers of a quasi-judicial tribunal.

The statutory authority for the regulation in question is found in Section 19 (a) of the Act, *infra,* p. 92, which provides:

> The Commision shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this title, including rules and regulations governing registration statements * * *.

The power "to make * * * rules * * * governing registration statements" seems clearly to include the power to regulate the mechanics of filing and withdrawing such statements. The word "governing" which is used in this provision is a word which in its normal usage must be taken to confer broad powers. Moreover, power to prescribe by rules and regulations the form and, within limits, the content of registration statements has been specifically granted to the Commission by the provisions of Section 7 and Schedule A, so that in order to ascribe any meaning at all to the discretion given the Commission under the above language of Section 19 (a), that body must thereby at least be empowered to regulate the procedural mechanics incident to the filing and withdrawal of registration statements.

Yet even without the specific power granted to the Commission in Section 19 (a), the inherent power of any judicial or quasi-judicial tribunal to control its proceedings would invest the Commission with the power to enact this regulation concerning withdrawal. In effect, the regulation merely imposes a reasonable condition upon the right of the registrant to terminate the orderly procedure which he has set in motion by the filing of his registration statement. Analogous rules regulating the voluntary dismissal of bills of complaint have long been familiar in courts of equity. In the federal practice, the complainant must move for

an order of dismissal and let the court fix the terms. *American Zylonite Co.* v. *Celluloid Manuf'g. Co.*, 32 Fed. 809 (C. C. S. D. N. Y.). And a local equity rule which allows the court to refuse a plaintiff permission to discontinue his action where justice so requires, even though the defendant cannot have affirmative relief under the pleadings and though his only prejudice is a possible second suit, has been adjudged valid. *Bronx Brass Foundry, Inc.* v. *Irving Trust Co.*, No. 232, Oct. Term, 1935, decided Feb. 10, 1936; *Young* v. *Southern Pacific Co.*, 25 F. (2d) 630 (C. C. A. 2). Irrespective of the rule which may be applicable if no regulation of the complainant's right to withdraw exists (see *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86), a regulation limiting that right is procedural and within the power of a quasi-judicial tribunal such as the respondent. Cf. *Bronx Brass Foundry, Inc.* v. *Irving Trust Co., supra.*

The cases cited by petitioner (Br., pp. 59–60) are not to the contrary. In *Cybur Lumber Co.* v. *Erkhart*, 247 Fed. 284 (C. C. A. 5) and *Barrett* v. *Virginian Ry. Co.*, 250 U. S. 473, the action was at law and in each case the point in issue was whether Federal courts should conform to state statutes expressly permitting voluntary nonsuits. In *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86, and *Thomson-Houston Electric Co.* v. *Holland*, 160 Fed. 768 (C. C. N. D. Ohio), no rule restricting the right to withdraw was involved, and the plaintiff was

allowed to withdraw. Such decisions are not inconsistent with a valid limitation imposed by rule of a court or any other quasi-judicial tribunal.[6] Cf. *Bronx Brass Foundry, Inc.* v. *Irving Trust Co., supra.*

Undoubtedly, the limitation imposed upon the registrant's right to withdraw must be reasonable, and not arbitrary or capricious. But the standard applied in this regulation—"with due regard for the public interest and the protection of investors"—is consonant with the spirit and purpose of the whole Act, and some limitation on the right of a registrant to withdraw is necessary for the effective administration of the Act. It is obvious that a registration statement ceases to be effective upon withdrawal, and can thus be no longer the subject of a stop order hearing which can only result in an order suspending the effectiveness of the statement.

To allow a registrant an unqualified privilege of withdrawal, with the consequent ability to terminate any stop order hearing or to prevent such a

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[6] The doctrine of *Ex parte Skinner & Eddy Corp., supra,* that in the absence of a controlling rule a court has no interest in retaining a suit which a litigant desires to dismiss, should not be extended to an administrative tribunal. Such a tribunal, in addition to ~~judicial~~ functions, has the executive responsibility of detection and enforcement. When a *specific* matter is drawn to its attention, it therefore has an interest in completing an analysis of that subject. A court has no similar interest for its function is confined to deciding such controversies as parties demand to have heard.

hearing, would seriously embarrass the work of the Commission. Such a broad privilege would permit the registrant to avoid, in large part, the registration requirements of the Act, by filing a registration statement with such limited information as he chose to give, withdrawing it when its deficiencies were detected, and repeating the process *ad infinitum* in the hope that by perseverance he might escape the vigilance of the examiner. Properly to perform its function of examining the matters set out in registration statements, the Commission must have the power, in cases where it believes it to be in the public interest, to refuse to permit the withdrawal of a registration statement, and to insist upon a final determination of the correctness of the statement filed. Only in this way can the Commission intelligently and expeditiously examine registration statements.

Of even greater significance is the fact that stop order hearings in regard to particular registration statements, and the final orders and opinions based thereon, constitute the most effective of the methods by which the Commission is to insure the accuracy and completeness of registration statements in general. The Commission may, it is true, investigate pursuant to Section 19 (b), and if it finds that the matters set out in the registration statement are false or incomplete, it may enjoin the continuance of this violation, or recommend criminal prosecution if the violation be willful. These, however, are extraordinary remedies requiring resort to the

courts; they are not to be lightly undertaken and are to be used only in exceptional cases. For the day-to-day administration of the registration provisions of the Act, the Commission must depend on the administrative remedy of the stop order, and if this is to be an effective sanction, hearings looking toward the issuance of stop orders must not be terminable at the pleasure of a registrant who desires to withdraw his statement.

Petitioner, however, advances several arguments to show that the regulation limiting withdrawals is invalid, even if it be specifically authorized by the Act or impliedly authorized by the necessities of procedure before the Commission. First, it is urged that the regulation is invalid because it has not been published in the manner required by the Act. The argument is based on a provision of Section 19 (a) which states:

> The rules and regulations of the Commission shall be effective upon publication in the manner which the Commission shall prescribe.

Petitioner, pointing out that there is no rule or regulation of the Commission prescribing the manner of publication of its rules and regulations, urges that the absence of such a rule invalidates every rule of the Commission, particularly since violation of some regulations may subject one to criminal penalties.

It seems obvious that the language quoted, upon which petitioner relies, does not bear out his

contention. The section does not require the Commission to prescribe "by rules and regulations" the manner in which its rules and regulations are to be published. Where Commission action is conditioned on the use of rules and regulations, the Act expressly so states. See, *e.g.*, Sections 3 (b), 6 (d), 7, 10 (b) (2), 10 (b) (3), 10 (b) (4), 10 (c) and Schedule A. Consequently, although adequate notice of the promulgation of regulations must be given to the public, the manner in which the Commission prescribes such notice need not be established by regulation.

Petitioner does not urge that the manner of publication actually utilized by the Commission is inadequate, nor has he at any time denied that he knew of the regulation limiting withdrawals. However, in order that the lower courts might be informed of the procedure which had been adopted, there were annexed to the briefs in both courts below affidavits by the Secretaries of the Federal Trade Commission and of the Securities and Exchange Commission, respectively, which have also been reprinted in the Appendix to the present brief at pp. 117–122. As appears from these affidavits, both the Federal Trade Commission, which was administering the Securities Act when the regulation in question was published, and the Securities and Exchange Commission, which has administered the Act since September 1, 1934, have made provision for wide publicity of their regulations

immediately upon promulgation. Thus, every regulation is given immediately to all the principal newspapers, and *any* person may have his name placed on the mailing list to receive free of charge all regulations as they are issued or compiled in booklets.[7] Such publication seems clearly adequate. Particularly should this be so with regard to a regulation such as the present one, which is merely procedural, and cannot possibly be made the basis of any penalty. Moreover, any defect in the original publication of this regulation has been remedied by Section 210 of Title II of the Securities Exchange Act of 1934 (Act of June 6, 1934, c. 404, 48 Stat. 908, U. S. C., Title 15, Sec. 78ii, reprinted in part in footnote 5, p. 13, *supra*), which specifically continued in effect all regulations issued by the Federal Trade Commission. Cf. *National Lead Co.* v. *United States,* 252 U. S. 140; *Brewster* v. *Gage,* 280 U. S. 327. Although this congressional action may not have cured irregularities in individual regulations, it must have cured any general defect involving all regulations alike.

Petitioner also suggests (Br., p. 60) that if the Act does authorize the regulation regarding with-

[7] The Federal Register Act (Act of July 26, 1935, 49 Stat. 500) and the regulations prescribed by the Administrative Committee of the Federal Register, approved by the President March 2, 1936, provide that on and after March 12, 1936, all rules and regulations pursuant to the authority of the Securities Act of 1933 shall be published in the Federal Register. Such publication will be in addition to publication in the manner now prescribed by the Commission.

drawal, it improperly delegates legislative power to the executive branch of the Government. But Congress can certainly delegate to an administrative officer or a commission the power to regulate the minutiae of the procedure of registration. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 214–215; *United States* v. *Grimaud*, 220 U. S. 506, 517. The recent cases upon which petitioner relies expressly recognize that details of a subordinate nature may be supplied by administrative regulations. See *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 428–429; *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 530. Moreover, petitioner's argument does not meet the point that the regulation in question may be justified under the inherent power of a quasi-judicial tribunal to control the proceedings before it, by rule or otherwise (*supra*, pp. 15–17). Cf. *Wayman* v. *Southard*, 10 Wheat. 1. Petitioner's further suggestion (Br., p. 63) that findings were a necessary prerequisite to the promulgation of the regulation is without foundation, for the regulation was general in scope, "not an administrative order in the nature of a judgment directed against an individual concern." *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 186.

Finally, petitioner contends that, even though generally valid, the regulation of the Commission was not validly applied against him, because the Commission made no appropriate finding that the refusal of its consent to the withdrawal of petition-

er's registration statement was in the public interest and for the protection of investors. The decision of the Commission to refuse consent was, however, merely a preliminary determination of fact which, in the absence of a showing that the exercise of discretion was arbitrary, rests in the discretion of the Commission. *Hills Bros.* v. *Federal Trade Commission,* 9 F. (2d) 481, 483 (C. C. A. 9); *Moir* v. *Federal Trade Commission,* 12 F. (2d) 22, 28 (C. C. A. 1). Cf. *Federal Trade Commission* v. *Klesner,* 280 U. S. 19, 29. The rule itself does not require findings for a denial of a request to withdraw, and there is no general principle that a finding must be made by either a court or an administrative tribunal prior to the application of such interlocutory procedural rules. Particularly should this be so when the ruling does not embody an affirmative command, but merely denies a request.

Petitioner's second major contention (Br., pp. 64–69) is that even if proceedings pending before the Commission have not been terminated by his efforts to withdraw his registration statement, the Securities Act did not authorize the order requiring him to appear and testify. This argument first assumes that the power of the Commission under Section 8 is limited to taking voluntary testimony and to issuing subpoenas *duces tecum,* but does not extend to subpoenas *ad testificandum;* and second, assumes that the sole source of power to require testimony in the instant proceeding is contained in

Section 8. Respondent submits that neither contention is sound.

Section 8 (d) of the Act, which authorizes the institution of stop-order proceedings, provides:

> If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state any material facts required to be stated therein or necessary to make the statements therein not misleading, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice, and after opportunity for hearing (at a time fixed by the Commission) within fifteen days after such notice by personal service or the sending of such telegraphic notice, issue a stop order suspending the effectiveness of the registration statement. * * *

This section is supplemented by Section 8 (e), which provides:

> The Commission is hereby empowered to make an examination in any case in order to determine whether a stop order should issue under subsection (d). In making such examination the Commission or any officer or officers designated by it shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the issuer, underwriter, or any other person, in respect of any matter relevant to the examination, and may, in its discretion, require the production of a balance sheet * * *.

> If the issuer or underwriter shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order.

There can be no doubt that Section 8 (e) authorizes the Commission to issue subpoenas *duces tecum*, and it should require much more specific language to justify the conclusion that Congress intended to allow the burdensome subpoena *duces tecum*, but not the less onerous subpoena *ad testificandum*.

That this construction of Section 8 (e) is proper is further borne out by the administrative importance of the "hearing" provided for in Section 8. The stop order, issued on the basis of such a hearing, is a final order of the Commission which is reviewable in the Circuit Court of Appeals pursuant to Section 9 (a), *infra*, pp. 79–81. The latter section also makes express provision for the finality of the findings of the Commission as to the facts upon which the order was based—facts which can be adduced only at the hearing. In order that the Commission might properly conduct a proceeding which will result in a final determination affecting the rights of the parties to the proceeding, Congress must have intended to confer upon it complete power to compel the production of any evidence nececessary to the final determination. Moreover, where a Circuit Court of Appeals, on application of either party, grants leave to adduce additional evi-

dence, Section 9 provides that such evidence shall be taken before the Commission, also at a "hearing". No provision is made for reference to a master or other officer of the court who would have power to issue subpoenas. Such power must inhere in the grant of authority of the Commission to hold a "hearing" before a stop order issues.

Petitioner also argues (Br., p. 66) in support of his contention, that the last sentence of Section 8 (e) means that the issuance of a stop order is the sole remedy available to the Commission if the issuer refuses to testify in a stop order proceeding. The sentence is as follows:

> If the issuer or underwriter shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order.

The argument fails to give due weight to the wording of the sentence. The power of the Commission is permissive—the conduct specified "shall be proper ground" for the issuance of a stop order, but its issuance is not mandatory, nor reasonably indicated to be the sole recourse of the Commission. If the Commission believes that an examination will enable it more adequately and properly to carry out its functions, it may subpoena witnesses and require the production of documents; if the purposes of the Commission will be adequately served merely by a stop order, the failure to cooperate in the hearing allows the Commission

to enter one forthwith. In the absence of specific authority to issue an order upon such a basis, it might well have been considered to be issuable only upon objective evidence as opposed to mere obstructive tactics.

Any other interpretation of this provision might, in many cases, work a hardship. The provision is equally applicable to issuers and underwriters; refusal of an underwriter to cooperate is ground for the issuance of a stop order. Consequently, if the provision were mandatory or the only method by which the Commission could punish contumacy, the refusal of an underwriter to testify might result in the suspension of the effectiveness of a registration statement even though the issuer were willing in good faith to cooperate with the Commission's examination in every respect. It is very unlikely that Congress could have intended any such result.

Moreover, petitioner's argument as to the proper construction and effect of the language of Section 8 ignores Section 19 (b) as a further source of the Commission's power to subpoena witnesses in a stop order proceeding. By that section the Commission or any officer designated by it is expressly authorized to subpoena witnesses and take evidence "for the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this title." It seems clear that a hearing under Section 8 (d) is such an in-

vestigation. The court below so decided (R. 124) and respondent submits that its determination was clearly sound. Certainly, if any examination be "necessary and proper for the enforcement of this title", a hearing to determine whether a stop order should issue should fall into the category.[8] See pp. 18–19, *supra*.

Petitioner's final objection to the present order (Br., pp. 69–71) is that it allows the Commission to embark upon a "fishing expedition." There are several answers to the contention. First, the notice of the stop order hearing (R. 12–13) and paragraph V of the application for the present order

[8] Although respondent believes that the authority of the District Court to issue the present order is amply sustained by the power given the Commission under Section 8 (d) and 8 (e) to determine whether a stop order should issue suspending the effectiveness of a registration statement, there is an additional basis upon which the order may be upheld. Several facts indicate that the proceeding before the Commission was directed, not only at a potential stop order under Section 8 (d), but also at an independent investigation under Section 19 (b). The application for the present order stated (R. 14) that the subpoena had been issued pursuant to both Section 8 (e) and Section 19 (b); the order of designation authorizing the officer of the Commission to conduct the proceedings (R. 14) was couched in the language of Section 19 (b) with regard to the powers conferred upon the designated officer; and the allegations in paragraph V of the application for the order (R. 3–12) show quite clearly that the Commission had reason to believe that the appellant was not only violating the registration requirements of the Act, but also that the violations are willful. And Section 19 (b) expressly empowers the officers of the Commission to subpoena witnesses in aid of investigations.

(R. 3–12) each specifies in detail the fifteen items in the registration statement upon which the Commission desires to examine the petitioner. Second, the order issued by the District Court (R. 102–103) requires petitioner to appear and testify only with regard to "any and all *pertinent* questions regarding the information and documents heretofore filed by the respondent with the Commission upon the said registration statement" (italics supplied). Finally, if at the hearing, any questions are asked which are not pertinent to the issues involved, it will be time enough then to object to them as beyond both the authority of the Commission and the order of the District Court.

II

THOSE PROVISIONS OF THE SECURITIES ACT OF 1933 WHICH REQUIRE THE PETITIONER TO APPEAR AND TESTIFY REGARDING HIS REGISTRATION STATEMENT, ARE A VALID EXERCISE OF THE POWERS GRANTED TO CONGRESS BY THE CONSTITUTION.

It has long been common knowledge that the facilities of the postal service and of the instrumentalities of interstate commerce have been used to practice misrepresentation, frauds, and a concealment of material facts in the sale of securities to the American people.[9] The losses thus incurred, al-

[9] See, e. g., *Annual Report of the Postmaster General* (1934), p. 56; *Report of the Senate Committee on Banking and Currency* (Sen. Rep. No. 1455, 73d Cong., 2d Sess.), Ch. II, esp. pp. 93, 100–101.

though impossible even to estimate accurately, are known to be enormous.[10] State Blue Sky laws, enacted in some form in 47 States, failed to stamp out this traffic.[11] In 1932 the Senate authorized a comprehensive investigation of stock-exchange practices, and subsequently expanded the scope of its inquiry to include banking operation and practices and the business of issuing, offering, and selling securities.[12] As a result of the information obtained during the course of this investigation, and in response to a special message transmitted to Congress by the President recommending Congressional action,[13] the present Securities Act was enacted on May 27, 1933 (c. 38, 48 Stat. 74).

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[10] The annual total has been estimated to be $1,700,000,000, and the total of the past ten years to be $25,000,000,000. Sen. Rep. No. 47, 73d Cong., 1st Sess., p. 2.

[11] As early as 1924, the National Association of Securities Commissioners, an organization of officers charged with the enforcement of the State laws had adopted a resolution urging the passage of a Federal act regulating the interstate sale of securities, and has since that time constantly been confronted with the problem of regulating interstate frauds effected by the use of the mails, the telephone, the telegraph, and the radio. See President's Report, *Proceedings of the National Association of Securities Commissioners* (1933) pp. 21–22. See also H. R. Rep. No. 85, 73d Cong., 1st Sess., p. 1; Sen. Rep. No. 47, 73d Cong., 1st Sess., p. 2. The Securities Act has met with the approval of these officers. See *Proceedings, National Association of Securities Commissioners* (1933) pp. 22–23; *id.*, (1934) p. 45.

[12] See Sen. Rep. No. 1455, *supra*, note 6, at pp. 1–3.

[13] H. R. Rep. No. 85, 73d Cong., 1st Sess., p. 1.

The Act is entitled "An Act To provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes." The stated purposes are accomplished by three main provisions. Section 5 forbids the sale of new issues of securities by means of the facilities of the mails or of interstate commerce unless a statement is on file disclosing all material information covering the issue. Sections 11 and 12 make officers, directors and underwriters civilly liable for any departure from the standards imposed by the Act. Section 17 prohibits all fraudulent devices in connection with the offering or sale of any security through the mails or in interstate commerce. All other sections of the Act are ancillary to these three provisions.

For purposes of determining the validity of the present order, the only section which is material is Section 5 (a), which provides:

> Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate com-

> merce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.[14]

The constitutional issue is further narrowed by the manner in which it is presented in the present case. Petitioner, without waiting for a specific question to be put to him, has flatly refused to appear before the Commission, and has thereby indicated that he is unwilling to answer any question that he might be asked. To maintain his position, therefore, petitioner must demonstrate that there is *no* purpose for which Congress can validly require that petitioner appear before the Commission and be questioned regarding his registration statement. Cf. *Bevan* v. *Krieger,* 289 U. S. 459, 465; *Blair* v. *United States,* 250 U. S. 273.

An analysis of Section 5 (a) reveals that the section does not purport to require registration of a security as a condition precedent to every transaction concerning that security. Registration is required as a condition precedent only to such transactions[15] relating to the sale of the security as involve (1) the use of the *mails;* (2) the use of means

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[14] Certain exemptions from the provisions of Section 5 are contained in Section 3 and Section 4 of the Act. These exemptions are not material to the present case.

[15] Transactions are subject to Section 5 only when the person engaging in them is an issuer, underwriter, or dealer, and in certain circumstances transactions even by such persons are exempt. Section 4.

or instruments of *transportation* in interstate commerce; and (3) the use of means or instruments of *communication* in interstate commerce.

It is plain that if the Congress has constitutional power to require registration as a condition precedent to any one of these courses of action, the requirement as applied to petitioner is valid. It is further evident that if registration may properly be required, reasonable examination of registrants in connection with such registration is lawful. *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447; *Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, 42. As has been demonstrated above (*supra*, pp. 17–19), the examination of registrants, despite attempted withdrawal of their registration statements, is reasonably related to, and necessary for, the proper enforcement of the registration provisions. Thus, since some examination is clearly appropriate in connection with valid registration requirements, the order of the lower court must be sustained if registration may be required under the authority of Congress either to regulate the postal system or to regulate interstate commerce.

A. THESE PROVISIONS OF THE SECURITIES ACT ARE A PROPER EXERCISE OF THE POWER OF CONGRESS TO ESTABLISH POST OFFICES AND POST ROADS

One of the expressed purposes of the Securities Act, as stated in its title, is "to provide full and fair disclosure of the character of securities sold

* * * through the mails." To this end, Section 5 (a) contains two separate provisions. By Section 5 (a) (1) an effective registration statement is made a prerequisite to the "use * * * of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise." By Section 5 (a) (2) the registration statement is made necessary before any person may "carry or cause to be carried through the mails * * * any such security for the purpose of sale or for delivery after sale." It will be necessary, for purposes of the present case, to discuss only the latter. See pp. 32-33, *supra*. Respondent submits that such a requirement is clearly within the scope of Congressional authority, as shown by the prior decisions of this Court.

Petitioner does not challenge the settled doctrine that the power of Congress "to establish post-offices and post-roads" is plenary, embracing the power to regulate the entire postal system. Nor does he challenge the rule that in the exercise of this power Congress has wide discretion as to the matter which shall be carried and that which shall be excluded from the mails. Indeed, the rule is settled beyond the possibility of dispute. *Ex parte Jackson*, 96 U. S. 727; *Ex parte Rapier*, 143 U. S. 110; *Badders* v. *United States*, 240 U. S. 391.

This power of Congress is not limited to excluding from the mails only those things which are deemed injurious to the postal service or personnel. In *Ex parte Jackson, supra*, a conviction for viola-

tion of a statute prohibiting the use of the mails in connection with a lottery was sustained, the Court holding that it was proper for the postal service "to refuse its facilities for the distribution of matter deemed injurious to the public morals" (p. 736). This decision was followed in another lottery case, *Ex parte Rapier, supra,* in which Mr. Chief Justice Fuller restated the view of the Court (p. 134):

> When the power to establish post-offices and post-roads was surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mail in aid of the perpetration of crime or immorality.

A like result was reached in *Badders* v. *United States,* 240 U. S. 391, in which the defendant had been indicted for placing letters in the mail for the purpose of executing a scheme to defraud. His argument in defense, that the law went beyond the powers of Congress as applied to a mere incident of a fraudulent scheme which was itself beyond the jurisdiction of Congress, was answered by Mr. Justice Holmes (p. 393):

> The overt act of putting a letter into the postoffice of the United States is a matter that Congress may regulate. *Ex parte*

> *Jackson,* 96 U. S. 727. Whatever the limits to its power, it may forbid any such acts done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not.

Other cases, which need not be discussed in detail, have sustained the power of Congress to exclude from the mails obscene and indecent matter (*United States* v. *Chase,* 135 U. S. 255; see *Public Clearing House* v. *Coyne,* 194 U. S. 497, 508), lottery tickets (*Horner* v. *United States,* 143 U. S. 207; *id.,* 570) and matter of a seditious nature (*Coomer* v. *United States;* 213 Fed. 1 (C. C. A. 8). Cf. *United States ex rel. Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407). Additional authorities are collected at p. 40 of petitioner's brief.

In preventing misuse of the mails, Congress is not limited to prescribing punishment for those who use them for transmitting undesirable matter or for the furtherance of fraudulent schemes. It may employ more positive sanctions, such as preventing the delivery of mails to one who is engaged in such practices. In *Public Clearing House* v. *Coyne,* 194 U. S. 497, a statute was challenged which authorized the Postmaster General to order the local postmaster to return all mail addressed to anyone who was shown by satisfactory evidence to be engaged in conducting a lottery or any other device for obtaining money through the mails by fraud. In affirming the denial of an injunction against the local postmaster who was acting pur-

suant to the "fraud order" of the Postmaster General, Mr. Justice Brown said (pp. 507–508):

> While it may be assumed, for the purpose of this case, that Congress would have no right to extend to one the benefit of its postal service, and deny it to another person in the same class and standing in the same relation to the Government, it does not follow that under its power to classify mailable matter, applying different rates of postage to different articles, and prohibiting some altogether, it may not also classify the recipients of such matter, and forbid the delivery of letters to such persons or corporations as in its judgment are making use of the mails for the purpose of fraud or deception or the dissemination among its citizens of information of a character calculated to debauch the public morality.

The requirements of Section 5 (a) embody a regulation which is not only better adapted to the control of fraud than the "fraud orders" sustained in *Public Clearing House* v. *Coyne, supra,* but also one which is less severe in its operation. Whereas the effect of a "fraud order" is to prohibit fraudulent persons from receiving *any* mail, the registration requirement merely prohibits a person from sending through the mail such securities as he does not choose to describe truthfully. Moreover the preliminary sifting involved in this latter form of regulation has the double advantage that it inflicts no burden upon innocent

communications, and that it operates with the effectiveness characteristic of control that precedes and prevents wrongful action.

In many cases the certificate itself, the mailing of which is forbidden, will be noxious because of the untrue statements or misrepresentations which it contains.[16] Certainly Congress may punish one who deposits in the mails such harmful certificates. *Ex parte Jackson,* 96 U. S. 727; *Ex parte Rapier,* 143 U. S. 110. And it may also punish one who deposits in the mail securities which, though themselves harmless, are being used to effectuate a fraudulent scheme. *Badders* v. *United States,* 240 U. S. 391.

Petitioner, however, while not seriously controverting the power of Congress to bar from the mails securities which are themselves noxious, or which are an integral part of a fraudulent scheme, urges that the manner in which the regulation is accomplished by Section 5 (a) of the present Act is beyond the postal power of Congress because the requirement of registration is imposed with respect to all securities which are transmitted

[16] Apparently the Certificates which petitioner proposes to issue are of this character. These Certificates (R. 62–63) contain a representation that "the rights and obligations of the Trustee are fully set forth in the Trust Agreement, a copy of which is on file with the Trustee." Yet the truth of this representation is directly challenged by the Commission, which states that it has reason to believe that the Trustee receives from petitioner an undisclosed additional fee. (See Commission's Application for Order, Paragraph V, Specification 10, R. 10.) If this be true, it would seriously affect the value of the Certificates.

through the mails, and is not limited to those securities which may in fact be fraudulent. It is well established, however, that in the exercise of its enumerated powers Congress may take such steps as are reasonably necessary to accomplish its purpose. Indeed, if the rule were otherwise, it would in many cases be impossible for any regulation effectively to be imposed. A close analogy is presented by *Public Clearing House* v. *Coyne, supra.* The "fraud order" forbidding the receipt of mail by the petitioner in that case applied to all mail addressed to the petitioner and was not limited to mail connected with the fraudulent enterprise. Answering the objection that such an order was unconstitutional, Mr. Justice Brown said (p. 510):

> Nor do we think the law unconstitutional, because the Postmaster General may seize and detain all letters, which may include letters of a purely personal or domestic character, and having no connection whatever with the prohibited enterprise. * * * A ruling that only such letters as were obviously connected with the enterprise could be detained would amount to practically an annulment of the law, as it would be quite impossible, without opening and inspecting such letters, which is forbidden, to obtain evidence of the real facts.

Similar cases involving the exercise of other powers of Congress, or of the States, have sustained

measures having a reasonable relation to the end sought to be accomplished. The statement in *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 201, may be regarded as typical:

> It is also well established that, when a State exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government.

See also *Ruppert* v. *Caffey,* 251 U. S. 264, 282, 299; *Everard's Breweries* v. *Day,* 265 U. S. 545, 560; *Merrick* v. *Halsey & Co.,* 242 U. S. 568, 587.

The further argument of petitioner that the Act is in excess of the postal power of Congress because a requirement of full disclosure of the material facts covering a new issue of securities will not bar *all* fraudulent securities from the mails needs only a brief answer. Certainly full disclosure will aid in reducing the immense number of securities which are marketed by misrepresentation and concealment, and the fact that Congress has chosen to limit its control to frauds of that sort is no reason to conclude that it has exceeded its powers. "The power may be determined by degrees of evil or ex-

ercised in cases where detriment is specially experienced." *Armour & Co.* v. *North Dakota,* 240 U. S. 510, 517; *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 557.

Petitioner urges, however, that even though the present Act be ostensibly within the postal power of Congress, it nevertheless is invalid because (1) it invades the powers reserved to the states and to the people by the Tenth Amendment and (2) it is in violation of the due process clause of the Fifth Amendment. Respondent submits that the objections are without weight.

Petitioner's argument that Section 5 (a) of the Act is in conflict with the Tenth Amendment is apparently based upon the contention that the effect of the Act is to regulate persons and business practices within the States. The contention seems to have been adequately answered by the cases already discussed. This Court has several times pointed out that it is not necessary that Congress have the power to deal with crime or immorality within the States in order to forbid the use of the mails to matter which it deems contrary to the public welfare. See *Ex parte Rapier, supra,* at p. 134; *Badders* v. *United States, supra,* at p. 393.

Nor can it be urged that Section 5 (a) is unconstitutional because it applies to the persons using the mails rather than the thing mailed, and so constitutes an attempt by regulation of the mails to extend Congressional power beyond its proper scope.

Actually, to the extent that Section 5 (a) (2) requires registration before the securities themselves may be mailed, which is the only phase of the Act with which we are here concerned, the primary application of the regulation is upon the security, not upon the person. The regulation upon the person, if there may be said to be any, is strictly limited to his use of the mails, a matter within Federal jurisdiction. The argument attempted by the petitioner would seem to be entirely inconsistent with *Badders v. United States, supra,* in which the overt act of mailing a letter, in itself innocent, but in furtherance of a scheme to defraud, was held to be within the power of Congress to punish. Clearly, the impact of such Congressional regulation is on the person mailing rather than on the object mailed. Similarly, in *Public Clearing House* v. *Coyne, supra,* the operation of the "fraud order" which prohibited the delivery of all letters to an addressee found to be conducting a fraudulent enterprise fell upon the addressee rather than upon the letters mailed.

This conclusion is in no way inconsistent with *Hammer* v. *Dagenhart*, 247 U. S. 251. In that case the court decided that Congress, by the ostensible exercise of its power on interstate commerce was attempting to control activity which was wholly the concern of the States. *Hammer* v. *Dagenhart,* however, has never been considered inconsistent with

the power of Congress to close the channels of interstate commerce to objects which it deemed noxious, and harmful to the people in other States to which they would otherwise be transported. *Lottery Case,* 188 U. S. 321; *Reid* v. *Colorado,* 187 U. S. 137; *Hipolite Egg Co.* v. *United States,* 220 U. S. 45; *Caminetti* v. *United States,* 242 U. S. 470; *Pittsburgh Melting Co.* v. *Totten,* 248 U. S. 1; *Brooks* v. *United States,* 267 U. S. 432; *Thornton* v. *United States,* 271 U. S. 414. A similar rule must be applicable to the power of Congress to close the mails to matter which it believes is contrary to the public welfare.[17]

Petitioner's final contention is that the registration requirements of the Act violate the due process clause of the Fifth Amendment. It has, of course, always been recognized that the plenary power of Congress over the mails is subject to the general limitations of the Bill of Rights. *Ex parte Jackson,* 96 U. S. 727; *Ex parte Rapier,* 143 U. S. 110; *United States ex rel. Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407, 430. However, within their respective jurisdictions, many States of the

[17] The care with which Congress has avoided any interference with purely local matters is exemplified by Section 3 (11), which exempts from the scope of the Act "Any security which is a part of an issue sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within, or, if a corporation, incorporated by and doing business within, such State or Territory."

United States, and many foreign countries, have imposed a similar requirement of registration in order to prevent sales of fraudulent securities.[18] State laws of this sort have been held consistent with the due process clause of the 14th Amendment. *Merrick* v. *Halsey & Co.*, 242 U. S. 568; *Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U. S. 559. Cf. *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539. A similar requirement by the Federal Government does not violate the Fifth Amendment.

Moreover, a substantially similar requirement of full disclosure of material information has been sustained in connection with the power of Congress to classify mailable matter. *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288, presented the constitutionality of an Act of Congress denying the low rate privilege of second-class mail to newspapers who did not file with the Postmaster General, and publish annually, a list of its owners, stockholders, bondholders, circulation, and principal creditors, and who did not mark all paid reading matter as advertisement. The classification was sustained, although, in effect, the denial of second-class privilege to newspapers was tantamount to exclusion from the mails. See Mr. Justice Brandeis, dissenting, in *United States ex rel. Milwaukee Publishing Co.* v. *Burleson, supra,* at 431.

[18] A complete collection of State Blue Sky laws may be found in Stocks and Bonds Law Service (131 and 132 Commerce Clearing House), Vols. I and II.

B. THESE PROVISIONS OF THE SECURITIES ACT ARE A PROPER EXERCISE OF THE POWER OF CONGRESS TO REGULATE COMMERCE AMONG THE SEVERAL STATES

Another of the expressed purposes of the Securities Act, as stated in its title, is "to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce". To this end, Section 5 (a) contains two separate provisions. By Section 5 (a) (1) an effective registration statement is made a prerequisite to the "use of any means or instruments of transportation or communication in interstate commerce * * * to sell or offer to buy such security through the use or medium of any prospectus or otherwise". By Section 5 (a) (2) the registration statement is made necessary before any person may "carry or cause to be carried * * * in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale". It will be necessary, for purposes of the present case, to discuss only the latter. If either prohibition be valid, then, as pointed out at pages 32–33, *supra,* the petitioner has failed to maintain the position essential to his case, that registration of securities cannot be required by Congress for any purpose whatsoever.

The Commission contends that the prohibition upon the interstate transportation of unregistered securities is valid inasmuch as (1) securities are subjects of commerce; and (2) the prohibition of

the interstate transportation of unregistered securities is a valid exercise of Congressional power "to regulate commerce among the several States."

1. SECURITIES ARE SUBJECTS OF COMMERCE

The Commission contends that shares of stock, bonds, trust certificates, and similar securities should be classified as subjects of commerce, both because of their inherent nature and because of their general resemblance to what this Court has already adjudged to be subjects of commerce.

Securities may be regarded as being property in themselves, as they are by the Uniform Stock Transfer Act [19] and by the declaration of trust here

[19] The Uniform Stock Transfer Act provides that "title to a certificate and to the shares represented thereby can be transferred only by delivery of the certificate" properly indorsed. (Section 1.) The result is that trading takes place only when the certificate is available; attachments and levies are possible only when the certificate is seized (Section 13); liens or restrictions are not recognized unless they are indicated on the certificate (Section 15); and in almost every possible way the certificate is treated as the share itself. This Act has been adopted by nearly half the states, including all the leading commercial states.

Alabama, Laws 1931, No. 483; Alaska, Laws 1913, ch. 67; Arkansas, Laws 1923, act 387; California, Stats. 1931, p. 1790; Colorado, Laws 1927, ch. 81; Connecticut, Laws 1917, ch. 325; Idaho, Laws 1927, ch. 88; Illinois, Laws 1917, p. 316; Indiana, Laws 1923, ch. 24; Louisiana, Laws 1910, No. 180; Maryland, Laws 1910, ch. 73; Massachusetts, Laws 1910, ch. 171; Michigan, Laws 1913, No. 106; Minnesota, Laws 1933, ch. 331; New Jersey, Laws 1916, ch. 191; New York, Laws, 1913, ch. 600; Ohio, Laws 1911, p. 500; Pennsylvania, Laws 1911, p. 126; Rhode Island, Laws 1912, ch. 840; South Dakota, Laws 1921, ch. 159; Tennessee, Laws 1925, ch. 91; Utah, Laws 1927, ch. 55; Virginia, Laws 1924, ch. 482; Wisconsin, Laws 1913, ch. 458.

involved [20] or they may be regarded merely as interests in property. In either case they should be held to be subjects of commerce because they are by common business usage treated and dealt in as such. "Commerce among the states is not a technical legal conception, but a practical one drawn from the course of business." *Swift and Co.* v. *United States,* 196 U. S. 375, 398.

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[20] Petitioner's argument (Br. pp. 13–15) that the securities registered by him are "oil royalties", and hence incorporeal interests in Oklahoma real estate, is manifestly unsound. Petitioner's registration statement showed that petitioner, as "sponsor" of the trust, was to deposit oil royalties in trust with a Trustee, and against the royalties so deposited the Trustee was to issue "Participation Trust Certificates in producing oil royalties" (R. 33). The statement was filed on the Commission's Form C–1, applicable to the securities of investment trusts (R. 33), rather than on Form G–1 or G–2, applicable to oil royalties. The certificates are made freely transferrable (R. 62, 65); and the Trustee is by the terms of the declaration of trust required to transfer or exchange them when properly endorsed and presented (R. 62–63, 64–65). After transfer, the new holder has absolute ownership (R. 66) and the exclusive right to receive payments of income and distributions of capital on this share of the property in trust (R. 65–66).

These certificates satisfy the definition of a security stated in Section 2 (1) of the Securities Act ("certificates of participation in a profit-sharing agreement"; "instrument commonly known as a 'security' "), and they have been held to be securities under substantially similar definitions in State Blue Sky laws. *Barnhill* v. *Young*, 46 F. (2d) 804 (S. D. Cal.). *Barrett* v. *Gore*, 88 Cal. App. 372; *People* v. *Ferguson*, 24 P. (2d) 965, 969 (Cal. App., not officially reported); *State* v. *Summerland*, 150 Minn. 266; *Freeze* v. *Smith*, 254 Mich. 386; *Ross* v. *Couden*, 22 Oh. App. 330.

Indeed measured even by technical legal conceptions formulated in previous cases, securities have "real or substantial value in themselves", and have "a money value in the market among those who chose to sell or buy." *Lottery Case,* 188 U. S. 321, 353, 354. They are not mere indemnities for a consideration. *New York Life Insurance Co.* v. *Deer Lodge County,* 231 U. S. 495, 508. On the contrary, they are "subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are * * * commodities to be shipped or forwarded from one State to another, and then put up for sale." Often, as in the case of so-called street certificates, without requiring a "signature" to complete this transfer. *Paul* v. *Virginia,* 8 Wall. 168, 183.

Not only are securities inherently subjects of commerce, but also in many respects they resemble the lottery tickets which were held to be subjects of commerce in the *Lottery Case, supra.* In that case this Court upheld a Federal statute making it a crime to cause a lottery ticket to be carried from one State to another. In disposing of a contention that lottery tickets were not subjects of commerce, Mr. Justice Harlan said (pp. 353–354):

> It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be

deemed subjects of the commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value. Upon their face they showed that the lottery company offered a large capital prize, to be paid to the holder of the ticket winning the prize at the drawing advertised to be held at Asuncion, Paraguay. Money was placed on deposit in different banks in the United States to be applied by the agents representing the lottery company to the prompt payment of prizes. These tickets were the subject of traffic; they could have been sold; and the holder was assured that the company would pay to him the amount of the prize drawn. That the holder might not have been able to enforce his claim in the courts of any country making the drawing of lotteries illegal, and forbidding the circulation of lottery tickets, did not change the fact that the tickets issued by the foreign company represented so much money payable to the person holding them and who might draw the prizes affixed to them. Even if a holder did not draw a prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery tickets. In short, a lottery ticket is a subject of traffic, and is so designated in the act of 1895.

The language of this quotation is peculiarly apposite to securities, for they also are "the subject of

traffic," "could have been sold," and "had a money value in the market among those who chose to sell or buy."

Another comparable case is *International Textbook Co.* v. *Pigg,* 217 U. S. 91. There a foreign corporation engaged in conducting a correspondence school resisted conditions and taxes imposed by the State of Kansas on the ground that it was engaged exclusively in interstate commerce. The evidence showed that the corporation from its Pennsylvania office regularly sent to its scholars in Kansas "books, apparatus and papers useful or necessary in the particular course of study the scholar is pursuing" (p. 106). On this evidence the Court sustained the corporation's contention that in carrying on its activities in Kansas, it was engaged exclusively in interstate commerce.[21]

If the transportation of information together with school books and school papers is interstate commerce, then *a fortiori* the transportation of securities (which not only serve as information as to the rights of the holders, but also themselves have value) is interstate commerce.

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[21] The rationale of *International Textbook Co.* v. *Pigg, supra,* that where a business involves the continuous transmission across State lines of information, documents, or persons, the business is interstate commerce, has been applied with respect to both federal legislation, *Ramsay Co.* v. *Bill Posters Assn.,* 260 U. S. 501; *Hart* v. *B. F. Keith Vaudeville Exchange,* 262 U. S. 501; *Federal Trade Commission* v. *Civil Service Training Bureau,* 79 F. (2d) 113 (C. C. A. 6), and state legislation, *Bay City* v. *Frazier,* 77 F. (2d) 570 (C. C. A. 6).

Reference should also be made to those cases which considered the validity of state Blue Sky laws under the commerce clause. In a series of six cases, all of which antedated the first decision of this Court upon the subject, six 3-judge District Courts unanimously held that securities were subjects of commerce. *Alabama & New Orleans Transportation Co. et al.* v. *Doyle,* 210 Fed. 173, 182–183 (E. D. Mich.); *William R. Compton Co.* v. *Allen,* 216 Fed. 537, 546–547 (S. D. Iowa); *Bracey* v. *Darst,* 218 Fed. 482, 495–496, 498 (N. D. W. Va.); *N. W. Halsey & Co.* v. *Merrick,* 228 Fed. 805, 806 (E. D. Mich.); *Geiger-Jones Co.* v. *Turner,* 230 Fed. 233, 238 (S. D. Ohio); *Sioux Falls Stock Market Co. et al.* v. *Caldwell,* no opinion, but decree reported at 230 Fed. 236 (D. S. D.).

When the issue finally reached this Court the state Blue Sky laws were held valid and not repugnant to the commerce clause. *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 557–558; *Caldwell* v. *Sioux Falls Stock Yards Co.,* 242 U. S. 559; *Merrick* v. *Halsey & Co.,* 242 U. S. 568. Although not deciding whether securities were subjects of commerce, this Court intimated that it regarded them as such, and disagreed only with the lower courts' finding that the state statutes were a burden on commerce. See particularly the language of Mr. Justice McKenna in 242 U. S., at pages 557–558. See also *New York ex rel. Hatch* v. *Reardon,* 204 U. S. 152, 161, in which Mr. Justice Holmes recognized that a certifi-

cate of stock "was more than evidence, it was a constituent of title." [22]

To refute the contention that securities are subjects of commerce the petitioner invokes the cases beginning with *Paul* v. *Virginia,* 8 Wall. 168, and culminating in *New York Life Insurance Co.* v. *Deer Lodge County,* 231 U. S. 495, which hold that the commerce clause does not prevent a State from regulating the insurance business since contracts of insurance are not subjects of commerce. But cases dealing with insurance are not persuasive authority with respect to securities. As the insurance cases themselves carefully emphasize, insurance contracts are not regarded as subjects of commerce because they are "contracts of indemnity", "not subjects of trade and barter offered in the market as something having an existence and value inde-

[22] It is generally held that certificates of stock are "goods, wares, and merchandise" within the meaning of the Statute of Frauds. Thus in *Tisdale* v. *Harris*, 20 Pick. 9, Chief Justice Shaw said (p. 13): "The word 'merchandise' also, *including in general, objects of trade and commerce*, is broad enough to include stocks or shares in incorporated companies." [Italics added.] See also *Illinois-Indiana Fair Assn.* v. *Phillips*, 328 Ill. 368, 374, and cases therein collected; *Williston on Contracts*, Vol. I, Sec. 251; Uniform Laws Annotated, Vol. 1, p. 27. Some important commercial jurisdictions also hold that a sale of corporate stock is a sale of goods within the meaning of the Uniform Sales Act. *Wills* v. *Investors Bankstocks Corp.*, 257 N. Y. 451, 456–457; *Postel* v. *Hagist*, 251 Ill. App. 454, 466. Cf. *Edwards* v. *Ioor*, 205 Mich. 617, 623. On this latter point there is, however, a division of authority. Uniform Laws Annotated, Vol. 1, p. 15. See also *Banta* v. *City of Chicago*, 172 Ill. 204, which construes an analogous ordinance.

pendent of the parties to them." *Paul* v. *Virginia, supra,* at p. 183; *New York Life Insurance Co.* v. *Deer Lodge County, supra,* at p. 508. By the very canons which have been used to prove that insurance contracts are *not* subjects of commerce, it is apparent that securities *are* subjects of commerce.

The petitioner also relies upon a number of isolated cases for the proposition that securities are not subjects of commerce. *Nathan* v. *Louisiana,* 8 How. 73; *New York ex rel. Hatch* v. *Reardon,* 204 U. S. 152; *Ware & Leland* v. *Mobile County,* 209 U. S. 405; *Moore* v. *New York Cotton Exchange,* 270 U. S. 593; *Hemphill* v. *Orloff,* 277 U. S. 537. Upon analysis, it appears that these cases do not support the proposition, or discuss the scope of Congressional power under the commerce clause. Most of them are concerned only with the question of the extent of State power.

In *Nathan* v. *Louisiana,* 8 How. 73, the precise ruling of the Court was that it was not repugnant to the commerce clause for the State of Louisiana to impose an occupation tax upon a broker whose business was buying and selling within the State of Louisiana so-called "foreign bills of exchange," that is, bills drawn on persons living in States other than Louisiana. With regard to this case it is important to note (1) that as counsel for the State of Louisiana pointed out (p. 79), the taxpayer did not introduce evidence showing that the particular bills in which he dealt were ever outside of the State of Louisiana, much less that the transactions

by which he bought or sold them were transactions requiring the delivery of the bills across state lines; (2) even if the bills of exchange had been tangible goods, and had been brought from a sister State, there would have been no valid objection under the commerce clause to a state occupation tax, *Woodruff* v. *Parham*, 8 Wall. 123; *Sonneborn Bros.* v. *Cureton*, 262 U. S. 506; and (3) that the general course of dealing in securities today cannot accurately be described in the way the business of dealing in bills of exchange was described in 1850. No court would now say that modern securities are "not transmitted through the ordinary channels of commerce", or are "worth more or less, as the rate of exchange shall be between the place where it is drawn and where it is made payable.". See footnote 24, on page 57, *infra*.

New York ex rel. Hatch v. *Reardon*, 204 U. S. 152, held that the commerce clause does not prevent the State of New York from imposing a non-discriminatory stamp tax upon a sale made in New York, by a resident of Connecticut to another resident of Connecticut, of shares of stock in corporations organized under the laws of Virginia and Wisconsin. The Court, although recognizing that securities were subjects of commerce; see pp. 51–52, *supra*, held that the particular transaction was not "commerce *between the States*" (p. 161).

Ware & Leland v. *Mobile County*, 209 U. S. 405, held that the State of Alabama could, without violating the commerce clause, require a license tax to be paid by brokers in Alabama whose sole busi-

ness was to receive from customers in Alabama orders for sales of cotton for future delivery, and to transmit those orders to other States where the contract for sale, and the subsequent delivery, if any, would be made. This case was concerned not with shares of stock or bonds, but with contracts for future delivery. One who makes a contract for future delivery (whether the commodity be cotton, grain, or shares of stock) ordinarily considers that the barter and trade relate to the commodity rather than to the contract itself. In ordinary business usage, persons talk of the commodity rather than of the contract as the "subject of commerce." Moreover, the particular contracts involved in the *Ware & Leland* case did not require "necessarily any movement of commodities in interstate traffic" (209 U. S. at 413).

Moore v. *New York Cotton Exchange,* 270 U. S. 593, held that transactions on the New York Cotton Exchange, a market for the purchase and sale of future cotton contracts, were "purely local in their inception and in their execution" since "if interstate shipments are actually made, it is not because of any contractual obligation to that effect." This case is distinguishable for the same reasons as *Ware & Leland* v. *Mobile County,* and for the further reason that it involved not the extent of the commerce power of Congress, but the extent of the exercise of that power in the Clayton Act. In view of *Board of Trade* v. *Olsen,* 262 U. S. 1, it cannot be doubted that for some purposes fu-

ture commodity contracts are within the power of Congress to regulate commerce.

In *Hemphill* v. *Orloff*, 277 U. S. 537, s. c. 238 Mich. 508, a Massachusetts business trust contended that since it was engaged exclusively in interstate commerce, it could do business in the State of Michigan without that State's consent and without complying with its statutes relating to foreign corporations. The proof convincingly showed that "the Trust was carrying on the business of dealing in negotiable notes within the State of Michigan" (277 U. S. at 550), and that most of the transactions were "executed in Detroit . . . upon property located in Detroit" (238 Mich. at 526). In view of this proof upon which the lower court had made an express finding that the trust "was doing business in the State" (238 Mich. at 526), it was not necessary to decide whether interstate transactions in securities could constitute interstate commerce.

The foregoing analysis reveals that none of these cases relates to the exercise of *federal* power over the transportation of securities.[23] They involve merely the extent to which state power may in varying ways affect the security business. The line which marks the point at which state taxation or regulation becomes permissible does not establish

[23] *Moore* v. *New York Cotton Exchange*, *supra*, p. 55, merely decided to what extent Congress had in fact exercised its power over trading in future commodity contracts. It was already clear that trading in such contracts was for some purposes within the commerce power of Congress. *Board of Trade* v. *Olson*, 262 U. S. 1.

the limit to which the power of Congress can extend in preventing abuses of commerce among the States. *Swift & Co. v. United States,* 196 U. S. 375, 400; *Stafford v. Wallace,* 258 U. S. 495, 525; *Binderup* v. *Pathe Exchange,* 263 U. S. 291, 311. Moreover, in all of these cases, with the possible exception of *Nathan* v. *Louisiana, supra,* the chief point was whether the particular facts in the case necessarily involved any *interstate* transportation. No similar doubt can exist with respect to the security business considered as a whole. It cannot be doubted that interstate transportation is a usual, and often a necessary,[24] method of selling securities. And in such sales all parties regard the securities as subjects of commerce.

[24] It is well known that under modern conditions many securities are distributed to the public through selling groups formed by investment bankers, and are later traded in on public stock exchanges. In each of these two stages interstate transportation is customary. The Senate Committee on Banking and Currency in its report on stock exchange practices (73d Cong., 2d Sess., Report No. 1455) described the final step in the distribution of a new offering in these words (Chapter II, p. 93): "The final group is a selling group or syndicate, composed of investment dealers *throughout the country* who effect the ultimate merchandising operation and place the issue in the hands of the investing public." (Italics supplied.) And in reference to trading on stock exchanges the Committee's Report pointed out (p. 5): "It is evident that a business of such stature not only entails the use of the mails and other instrumentalities of interstate commerce but itself constitutes an important part of the current of interstate commerce." Although these quotations are from a Senate report which was not limited to the particular statute now under review, they state facts which are of general knowledge.

2. THE PROHIBITION OF THE INTERSTATE TRANSPORTATION OF UNREGISTERED SECURITIES IS A VALID EXERCISE OF THE POWER OF CONGRESS TO REGULATE COMMERCE AMONG THE SEVERAL STATES

The provisions of the Securities Act here involved (see p. 45, *supra*) go no further than to require that before a security is transported in interstate commerce,[25] there shall be disclosed to the Securities and Exchange Commission,[26] and hence made available to the public,[27] the salient characteristics of the security.

This disclosure tends to prevent two different sorts of evil: the interstate transportation first of certificates which, like those involved in this case, see footnote 14, page 38, *supra,* are themselves harmful because they bear on their face misrepresentations, and second, the sale of securities which have been otherwise misrepresented.

Prior cases make it clear that these evils are subject to regulation under the commerce clause. Congress may exclude from the channels of commerce articles which are themselves harmful, *Lottery Case,* 188 U. S. 321, *Hipolite Egg Co.* v. *United States*, 220 U. S. 45. And it may also forbid the use of channels of interstate commerce to promote dishonesty or immorality, *Brooks* v. *United States* 267 U. S. 42; *Caminetti* v. *United States,* 242 U. S. 470.

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[25] Section 5 (a).
[26] Section 6 (a).
[27] Section 6 (d).

In order to make this regulation effective, Congress may require information with respect to all articles of the same type, *McDermott* v. *Wisconsin*, 228 U. S. 115, 131; *Weeks* v. *United States*, 245 U. S. 618; *Pittsburgh Melting Co.* v. *Totten*, 248 U. S. 1; *Thornton* v. *United States*, 273 U. S. 414, even though the requirement necessarily embraces innocent articles used only for legitimate purposes. *Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 201; *Public Clearing House* v. *Coyne*, 194 U. S. 497, 507–508; *Ruppert* v. *Caffey*, 251 U. S. 264, 282, 289–300; *Everards' Breweries* v. *Day*, 265 U. S. 545, 560.

Several of these cases have already been referred to in the discussion of the postal power (see pp. 39–40, *supra*), and most of the others are summarized in *Brooks* v. *United States*, 267 U. S. 432. In that case, which decided that Congress could make it a federal crime to transport in interstate commerce a stolen automobile, Mr. Chief Justice Taft said (pp. 436–437):

> Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 215. In *Reid* v.

Colorado, 187 U. S. 137, it was held that Congress could pass a law excluding diseased stock from interstate commerce in order to prevent its use in such a way as thereby to injure the stock of other States. In the *Lottery Case,* 188 U. S. 321, it was held that Congress might pass a law punishing the transmission of lottery tickets from one State to another, in order to prevent the carriage of those tickets to be sold in other States and thus demoralize, through a spread of the gambling habit, individuals who were likely to purchase. In *Hipopolite* [sic] *Egg Co.* v. *United States,* 220 U. S. 45, it was held that it was within the regulatory power of Congress to punish the transportation in interstate commerce of adulterated articles which, if sold in other States than the one from which they were transported, would deceive or injure persons who purchased such articles. In *Hoke* v. *United States,* 227 U. S. 308 and *Caminetti* v. *United States,* 242 U. S. 470, the so-called White Slave Traffic Act, which was construed to punish any person engaged in enticing a woman from one State to another for immoral ends, whether for commercial purposes or otherwise, was valid because it was intended to prevent the use of interstate commerce to facilitate prostitution or concubinage, and other forms of immorality. In *Clark Distilling Co.* v. *Western Maryland Railway Co.,* 242 U. S. 311, it was held that Congress had power to forbid the introduction of intoxicating

liquors into any State in which their use was prohibited, in order to prevent the use of interstate commerce to promote that which was illegal in the State. In *Weber* v. *Freed,* 239 U. S. 325, it was held that Congress had power to prohibit the importation of pictorial representations of prize fights designed for public exhibition, because of the demoralizing effect of such exhibitions in the State of destination.

The petitioner attempts to distinguish *Brooks* v. *United States, supra,* and the authorities there reviewed on two grounds: first, that Section 5 (a) excludes from the channels of commerce merely unregistered securities, but does not exclude registered securities that are of no value (Br. pp. 30–31, 22); and second, that Section 5 (a) violates the Tenth Amendment since it is a regulation of conduct within a State, and not of commerce among the States (Br. pp. 23, 28).

In the discussion of the postal power, it has been shown that the first distinction is true but of no legal significance, pages 40–41, *supra,* and that the second distinction is unsound, pages 41–42, *supra.* The clause in Section 5 (a) which covers transportation of securities is clearly limited to "transportation in *interstate commerce.*"

Unlike the Child Labor Law considered in *Hammer* v. *Dagenhart,* 247 U. S. 251, the registration provisions of the Securities Act do not attempt to regulate or standardize local conditions under

which articles are produced and do not attempt to induce any change in local law.[28] (See 247 U. S. 272.) Section 5 (a) leaves the channels of commerce open to any security whatsoever, regardless of how it was created, what it is worth, or on what terms it is sold. The present statute is parallel not to the Child Labor Law, but to the Lottery statute, the Pure Food and Drug Act, and similar federal statutes which were distinguished in *Hammer* v. *Dagenhart* (at p. 271) on the ground that they prevented "the use of transportation * * * necessary to the accomplishment of harmful results", and which were invoked in *Brooks* v. *United States, supra* at p. 436) as precedents for "forbidding and punishing the use of * * * commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other States from the State of origin."

It has already been pointed out at page 44, *supra,* that the requirement that securities be registered in advance of transportation does not deprive petitioner of liberty or property without due process of law. *Caldwell* v. *Sioux Falls Stock Yards Co.,* 242 U. S. 559; *Merrick* v. *Halsey & Co.,* 242 U. S. 568; cf. *Hall* v. *Geiger-Jones,* 242 U. S. 539.

[28] Section 18 of the Securities Act provides: "Nothing in this title shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person."

CONCLUSION

Wherefore, it is respectfully submitted that the decree of the court below should be affirmed.

Respectfully submitted.

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